No. 3987

United States Circuit Court of Appeals for the Ninth Circuit

E. M. HOOVER, as Trustee of the Jordan Valley Land & Water Company, a bankrupt, and T. H. WEGENER, as Trustee of the Jordan Valley Farms, a bankrupt,
Appellants,

vs.

MORTGAGE COMPANY FOR AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Oregon

BRONAUGH & BRONAUGH,
Solicitors for Appellee,
Residence: Portland, Oregon.

Filed....., 1923.

....., Clerk.

IRWIN-HODSON

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Statement of the Case

The facts material to the consideration of the questions raised by the appeal are that on the 23rd day of September, 1921, an order of the District Court was passed requiring the defendants Jordan Valley Land & Water Company and Jordan Valley Farms to appear on the 29th day of September, 1921, at the hour of

10:00 a. m., then and there to show cause why a receiver should not be appointed to take charge of their respective properties. This order was duly served on each of the defendant corporations on the 26th day of September, 1921, and due proof of such service made in said Court and cause, and on the 29th day of September, 1921, an order was passed by the District Court appointing a receiver. (Record pp. 24-26.)

On March 10, 1922, nearly six months after the appointment of the receiver, the defendant Jordan Valley Land & Water Company, was adjudged bankrupt by order of the District Court of the United States for the District of Idaho, Southern Division, and thereafter the appellant E. M. Hoover, was appointed trustee in bankruptcy of said bankrupt corporation. (Record pp. 43-45.)

That on the 10th day of March, 1922, nearly six months after the appointment of the receiver, the defendant corporation Jordan Valley Farms was adjudged bankrupt by said District Court of the United States for the District of Idaho, Southern Division, and thereafter the appellant T. H. Wegener was appointed trustee in bankruptcy for said bankrupt corporation. (Record pp. 67-68.)

After the sale of the mortgaged securities under the decree of foreclosure, and on the 27th day of June, 1922, the receiver presented to the Court his petition for an order allowing his expenses and fixing compensation for himself and his counsel. (Record pp. 46-53.) Prior to

this time, however, and on May 4, 1922, the appellant E. M. Hoover as trustee in bankruptcy of the Estate of the Jordan Valley Land & Water Company, filed in said Court and cause this petition for delivery to him by the receiver of Jordan Valley Land & Water Company of certain properties held by the said receiver (Record p. 38) and on the 8th day of July, 1922, the appellant T. H. Wegener, as trustee in bankruptcy of Jordan Valley Farms, filed his petition in said Court and cause for the delivery to him of certain properties owned by the receiver. (Record p. 54.) The appellant Hoover as trustee, filed an answer to the petition of the receiver (Record p. 56), the receiver filed an answer to the petition of the appellant Hoover (Record p. 63), the receiver filed an answer to the petition of the appellant Wegener (Record p. 65), and the appellant Wegener filed an answer to the petition of the receiver (Record p. 67). The matters raised by said petitions and answers came on for hearing before the District Court on July 14, 1922, and on said July 14, 1922, the District Court duly passed its order allowing compensation to the receiver for his services as receiver of Jordan Valley Land & Water Company, and also making allowance to the receiver for compensation for his counsel, and making such allowances to the receiver and his counsel a specific lien upon the assets of the defendant Jordan Valley Land & Water Company, and also making allowance to the receiver for his compensation as receiver of Jordan Valley Farms and for his expenses on that behalf, and making such allowances a specifie lien on the assets of the Jordan Valley Farms in the hands of the receiver.

This order was made after a hearing before the Court at which the receiver appeared by his counsel, Wallace McCamant and Earl C. Bronaugh, and the appellant E. M. Hoover as trustee in bankruptcy, appeared by Richards & Haga, his attorneys, and the appellant H. H. Wegener, as trustee in bankruptcy, appeared by L. J. Aker, his attorney (Record p. 78). By this order, it was expressly provided that the appellee pay the allowances to the receiver, and that on such payment the appellee be subrogated to the rights and lien of the receiver, and it was expressly provided and ordered that the receiver turn over to the respective trustees in bankruptcy the assets of the defendant corporations when the charges allowed by the order shall have been paid in full, and not otherwise.

In obedience to said order the appellee made payment of the allowances made by the said order of July 14, 1922, and after more than three months had elapsed without the appellee having been reimbursed for such payment so made by it, the appellee presented its petition to the District Court for an order directing the receiver to sell the assets in his possession to satisfy the amounts so paid by the appellee under the order of July 14, 1922 (Record pp. 81-82). Thereupon, the appellant T. H. Wegener, as trustee in bankruptcy for Jordan Valley Farms, filed his petition asking that the order dated July 14, 1922, allowing the receiver's fees and expenses to be vacated (Record p. 100). No petition for the vacation of said order was made by the appellant E. M. Hoover. The petition of the appellant Wegener and the several affidavits in support thereof

(Record pp. 82-101) were filed on October 30, 1922, the day upon which the appellee's petition for sale of the assets was set for hearing, and both said petitions were heard on that day, both the appellant Wegener and the appellee being in Court by their respective counsel, and on that day the Court directed that an order be entered for the sale of the assets, which order appears at page 102 of the record, although the order was not signed until the 3rd day of November, 1922.

Brief of Argument

The Oregon law provides for service upon non-resident defendants in suits to foreclose liens on personal property.

Oregon Laws Comp. 1920, Sec. 399.

And jurisdiction in the Federal Court for the District of Oregon to foreclose such liens is specifically provided by the judicial code, and has been held to apply alike to real and personal property.

Federal Judicial Code, Sec. 57.
Dick v. Foraker, 155 U. S. 405, 39 Law Ed. 201.
Jellenik v. Huron Copper Mining Co., 177 U. S. 7.
Louisville & N. R. Co. v. Western U. Tel. Co., 234 U. S. 374, 58 Law Ed. 1359.
Johnson v. North Star Lumber Co., 206 Fed. 624.

It is the law in Oregon that appearance by the defendant, unless it is special, gives the court jurisdiction of the person.

Oregon Laws, Sec. 63.
Roethler v. Cummings, 84 Ore. 442, 165 Pac. 355.
Duncan Lumber Co. v. Willapa Lumber Co., 93 Or. 386, 182 Pac. 172, 183 Pac. 476.

Such also is the rule in the Federal courts.

Johnson v. North Star Lumber Co., 206 Fed. 624.
Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 52 Law Ed. 1101.
St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 Law Ed. 659.

It is well settled by a long line of authorities that where jurisdiction over the subject-matter depends upon diverse citizenship, and the parties are in fact citizens of different states, the objection that the suit is brought in a district where neither is an inhabitant does not survive general appearance; and when the plaintiff is an alien, the same jurisdiction over the subject matter exists as when there is diversity of citizenship.

Interior Construction Co. v. Gibney, 160 U. S. 217.
Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547.

The courts of the United States are vested with general jurisdiction of civil actions, involving requisite pecuniary value, "between a state or the citizens thereof, and foreign states, citizens or subjects". Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action dismissed. But the provision as to the *particular district* in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or waive at his election; and the defendant's right to object that an action within the general jurisdiction of the court, is brought in the wrong district, is waived by pleading to the merits.

Interior Construction Co. v. Gibney, 160 U. S. 217.
Gracie v. Palmer, 8 Wheat. 699.
Ex parte Schollenberger, 96 U. S. 369, 378.
St. L. & S. F. Ry. v. McBride, 141 U. S. 127.
Texas & P. Ry. v. Saunders, 151 U. S. 105.
Central Trust Co. v. McGeorge, 151 U. S. 129.

Where diversity of citizenship exists, as it does here, so that the suit is cognizable in *some* Federal Court, the objection that there is not jurisdiction in a particular district is waived by appearing and pleading to the merits.

In re Moore, 209 U. S. 490.
Western Loan Co. v. Butte & B. Min. Co., 210 U. S. 368.
Johnson v. North Star Lumbr. Co., 206 Fed. 624.

When upon a hearing in equity in district court, or by a judge thereof in vacation, an interlocutory order shall be made appointing a receiver, an appeal may be taken from such interlocutory order, to the circuit court of appeals; but such appeal must be taken within thirty days from the entry of such order.

Judicial Code, Sec. 129.

No appeal having been taken, within the statutory time, or at all, from the order appointing the receiver and directing him to take charge of all the assets of the defendant corporations, that order cannot be reviewed upon this appeal from a later order.

Hereford v. Hereford, 134 Ala. 321 (32 So. 651).
Leinkauff v. Tuscaloosa Sale &c. Co., 105 Ala. 328 (16 So. 891).

Expenses and compensation of receiver and the fund or property from which payment of same shall be made are matters within the discretion of the court appointing the receiver.

Hall v. Stubb, 126 Ga. 521, 55 S. E. 172.
Northrup Nat'l Bank v. Varner, 109 Pac. 394 (Kan.)

Eames v. H. B. Claflin Co., 231 Fed. 693.
Trustees v. Greenough, 105 U. S. 527, 26 Law Ed. 1157.
Stuart v. Boulware, 133 U. S. 78, 33 Law Ed. 568.

Expenses and compensation of receiver may be paid out of assets remaining in hands of receiver after sale of mortgage property.

Strain v. Palmer, 159 Fed. 628.
Clark v. Brown, 119 Fed. 130.
Mauran v. Crown Carpet Co., 50 Atl. 387 (R.I.)

It is a general rule that an appeal will not lie from an order or decree entered by consent of parties.

3 C J., Sec. 546, p. 671.
U. S. v. Babbitt, 104 U. S. 767; 26 L. Ed. 921.
Ballot v. U. S., 171 Federal 404.
Talbot v. Mason, 125 Federal 101.
Eustis v. Henrietta, 74 Federal 578.
Pacific R. R. Co. v. Ketchum, 101 U. S. 289; 25 L. Ed. 932.

Where a judgment or order is rendered pursuant to an agreement of the attorneys of the parties, the Court on appeal must assume that the lower Court found that the attorneys had authority to make the agreement.

Monk v. Wabash R. Co., 150 S. W. 1083; 163 Mo. App. 692.
Pacific R. R. Co. v. Ketchum, 101 U. S. 281, 296; 25 L. Ed. 932.

Even though a consent judgment or order may be void for want of authority no appeal will lie therefrom the proper remedy being to move the Court to set it aside and then appeal from his order denying such motion.

Monroe County Court v. Miller, 132 Ky. 102, 116 S. W. 272.

Where the property at the time of bankruptcy is in the possession of a receiver appointed outside of bankruptcy, and the receivership is created within the four months preceding the filing of the bankruptcy petition, upon the adjudication of bankruptcy occurring, the Bankruptcy Court supersedes the Court appointing the receiver and takes over the property involved for administration in bankruptcy.

1 Remington on Bankruptcy, Secs. 1602, 1625.
McGahee vs. Cruickshank, 133 Ga. 649 (66 S. E. 776).
Stacy vs. McNicholas, 76 Or. 167-188.

But where more than four months have elapsed from the appointment and qualification of the receiver to the filing of the petition in bankruptcy, the Court first obtaining jurisdiction of the "res" retains it to the end.

Southwell vs. Church, 51 Tex. Civ. App. 547, 111 S. W. 969.
High on Receivers, 4th Ed., Secs. 50, 52.
Gaylord vs. Ft. Wayne, Etc. Co., Fed. Cas. No. 5284, 6. Biss. 286.

Where property is in custody of the receiver more than four months prior to filing petition in bankruptcy, receivership is not terminated by adjudication in bankruptcy.

1 Collier on Bankruptcy, 12th Ed. p. 558.
Blain vs. Brailey, 221 Fed. 1.

Where trustee in bankruptcy applies to Court appointing receiver for order to deliver property to trustee, the Court appointing the receiver may retain the costs and compensation for its officer.

IV. Pom. Eq. Juris, Sec. 1591.
High on Receivers, 4th Ed., Sec. 796b.
McGahee vs. Cruickshank, 133 Ga. 649 (66 S. E. 776.)
First Nat. Bank vs. Zangwill, 61 Fla. 596, 54 So. 375.
Stacy vs. McNicholas, 76 Or. 167-185.

If receiver has expended a large sum, or involved himself in future liabilities, the Court may secure him before directing delivery of possession.

Hull vs. Storagehouse, 152 N. Y. Supp. 363.

Argument

This suit was brought to foreclose a lien upon certain notes secured by mortgages on real property in Malheur County, State of Oregon, the lien having been created to secure a loan of money to the defendants.

The complaint specifically avers that the personal property upon which the liens are claimed is within the possession of a trustee in the complaint named, and within the State of Oregon and the jurisdiction of the trial court.

The District Court for the District of Oregon had jurisdiction of the cause for two reasons: (a) by the practice under the law of Oregon, and the specific provision of the judicial code of the United States the court could entertain the suit because it is of a local nature; and (b) the defendants by their actions in court waived the right to question the jurisdiction of the person.

A

Not only does the Oregon law provide for service upon non-resident defendants in suits to foreclose liens on personal property (and the federal court in that regard will consider the state practice) but jurisdiction in the federal court for the district of Oregon is specifically provided by the judicial code.

Oregon Laws, Sec. 399.

> "In addition to the cases enumerated in the subdivisions of section 56, service of the summons may be made by publication in the following cases:
>
> 1. When the subject of the suit is real or personal property in this state, and the defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or

partly in excluding the defendant from any lien or interest therein;"

Federal Judicial Code, Sec. 57.

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

Thereafter follows provisions that if the defendants do not appear the judgment of the court can reach the property only as a proceeding in rem.

The jurisdiction so provided by Section 57 of the Judicial Code has been held to apply alike to personal property and real property.

Dick v. Foraker, 155 U. S. 405; 39 L. Ed. 201.

This case involved a suit to quiet title to land in the state of Arkansas brought in the Federal Court for that state by a citizen of Ohio against a citizen of Illinois. After holding that this is a suit made local in its nature by Section 57 of the Judicial Code, the court took up the contention that the use of the words "one or more defendants" in Section 57 meant that at least one of the defendants must be a resident of the district in which suit is brought. The history of the act is discussed and the court comes to the conclusion that it is immaterial whether there be one or more defendants.

> "Section 737 provides for a case where there are 'several defendants' and 'one or more' may be outside of the district: the Act of 1875, on the contrary, provides for a case where 'one or more of the defendants' may be outside of the district, the difference between the two being that which exists between 'one or more of several' and 'one or more.' The demurrer was, therefore, correctly overruled."

Jellenik v. Huron Copper Min. Co., 177 U. S. 7; 44 L. Ed. 647.

This case involved personal property. As stated by the court, "one of the objects of the present suit was to remove an incumbrance or cloud upon the title to certain shares of the stock of a Michigan corporation." There existed a lack of diversity of citizenship as to certain of the defendants and the bill was dismissed for want of

jurisdiction because those defendants were indispensable. The court holds that the defendants are indispensable but construes Section 57 of the Judicial Code (Section 8 of the Act of 1875) to apply to both personal property and real property, and then says that the situs of corporate stock is where the books of the company are kept, and as these books were within the jurisdiction of the court the court had jurisdiction of the cause.

Louisville & N. R. Co. v. Western U. Teleg. Co., 234 U. S. 374, 58 L. Ed. 1359.

Here a Kentucky corporation in the Federal Court for the state of Mississippi sued a New York corporation to remove a cloud upon real property created by certain state judgments alleged to be void. The Judicial Code regarding the venue of actions and jurisdiction of the person of defendants is again construed; Section 57 is quoted in full and then the court said:

> "It will be perceived that this section not only plainly contemplates that a suit 'to remove any encumbrance, lien, or cloud upon the title to real or personal property' shall be cognizable in the District Court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district."

After holding that there was no merit in the objection mentioned as yet to be considered, the court further says that Section 57 embraces suits which may be founded upon the remedial statutes of the several states.

> "We conclude that the provision in Section 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several states, as well as when resting upon established usages and practice in equity."

Johnson v. North Star Lumber Co., 206 Fed. 624, Ninth Circuit Court of Appeals.

Here the Circuit Court of Appeals for this circuit again applies the rule that the Federal Court will enforce rights that could be enforced under the state law if a diversity of citizenship exists as it does in the case at bar.

> "In such a suit, where a diversity of citizenship exists as it does here, the Circuit Court of the United States for the district of Oregon had jurisdiction of the controversy, and, the action being local to that district, the court had jurisdiction over the subject-matter."

See also:

> Chase v. Wetzlar, 225 U. S. 79; 56 L. Ed. 990.
> Single v. Scott Paper Mfg. Co., 55 Fed. 553.

Pennington v. Fourth National Bank, 243 U. S. 269; 61 L. Ed. 713.

In the case last cited the court holds that jurisdiction dependent upon constructive service extends alike to tangible and intangible property, and that such property may be subjected to the action of the court by a trustee or injunction process, as well as by garnishment or attachment. We call the attention of the court to the fact that in the case at bar the court has taken possession of the property involved by the appointment of a receiver.

B

The defendants made a number of general appearances. It is the law in Oregon that an appearance by the defendant, unless it is special, gives the court jurisdiction of the person.

Oregon Laws, Sec. 63.
Roethler v. Cummings, 84 Or. 442; 165 Pac. 355.
Duncan Lumber Co. v. Willapa Lumber Co., 93 Or. 386; 182 Pac. 172; 183 Pac. 476.

In the latter case on rehearing at page 403 of the Oregon reports is an excellent discussion distinguishing between jurisdiction of the subject-matter and jurisdiction of the person, and holding that the offering of a contest on the merits waives any objection to jurisdiction of the person.

Such is the rule in the Federal Courts, which hold that an appearance preceding the motion or a motion to dismiss which goes to the merits as well as to jurisdiction of the person, or the joinder of a motion to dismiss and an answer on cross complaint, will alike give the court jurisdiction and waive the objection of venue.

Johnson v. North Star Lumber Co., 206 Fed. 624, Ninth Circuit.

Here an objection to the jurisdiction of the court was either coupled with or followed by an answer and cross-bill.

> "Further, the defendant, by answering the bill of complaint on the merits, and by filing a cross-bill submitting his title to the jurisdiction of the court and praying for affirmative relief, waived any objection he might otherwise have had to the jurisdiction of the Circuit Court of the District of Oregon. Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101."

Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368; 52 L. Ed. 1101.

Suit in Montana by citizen of Utah against a citizen of New York. A demurrer was filed challenging the jurisdiction of the court as to (a) subject-matter, and (b) person of the defendants; also said demurrer asserted that the complaint did not state facts sufficient, was uncertain and unintelligible. The court held that

this joinder of contentions by demurrer waived the objection of venue and again said that the court would follow the state practice.

> "So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under sections similar to Section 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States circuit court, as is shown by the case of Shaw v. Quincy Min. Co. (Ex parte Shaw), 145 U. S. 444, 36 L. Ed. 768, 12 Sup. Ct. Rep. 935—a suit in a district in the state of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of states other than New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in Re Keasbey & M. Co. supra."

St. Louis and San Francisco R. Co. v. McBride, 141 U. S. 127; 35 L. Ed. 659.

Here again a defendant, attacking the venue, demurred on the grounds: (a) want of jurisdiction of the person of the defendant; (b) want of jurisdiction of the subject-matter, and (c) because the complaint did not state facts sufficient. The court said:

> "Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

Interior Construction & Improvement Co. v. Gibney, 160 U. S. 219; 40 L. Ed. 401.

In this case, as in the case at bar, non-resident defendants entered an appearance and then moved to dismiss for want of jurisdiction of the person, but the court held that this general appearance waived the jurisdictional objection.

Central Trust Co. v. McGeorge, 151 U. S. 133; 38 L. Ed. 100.

This was an action against non-residents of the district and did not involve a local question. The defendants, however, appeared and agreed to the appointment of a receiver. The court held that this waived the objection on jurisdictional grounds.

Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547.

This was a suit brought in the District Court of the United States for the Eastern District of New York, by an alien against a citizen and resident of Pennsylvania. The Circuit Court of Appeals held:

> "It is well settled by a long line of authorities that where jurisdiction over the subject matter depends upon diverse citizenship, and the parties are in fact citizens of different states, the objection that the suit is brought in a district where neither is an inhabitant does not survive general appearance". (Citing Interior Construction Co. v. Gibney, *supra.*) "That is to say, the limitations imposed by Congress as to the place of trial are only for the convenience of the defendant, and do not involve jurisdiction of the court at all, properly speaking. The difference of opinion which at one time existed in the case of removed causes (citing cases) never applied to those of original jurisdiction.
>
> "When the plaintiff is an alien, the same jurisdiction over the subject-matter exists as when there

> is diversity of citizenship * * *. There is no conceivable reason why a different rule should apply to the case of an alien suing a citizen out of the proper district, from that which governs a citizen so suing."

We submit that the Court has jurisdiction both because of the specific provisions of the Judicial Code, and because of the general appearance repeatedly made by the defendants.

The complaint alleged the insolvency of the defendants, and the inability of the Jordan Valley Land and Water Company to finance the operation of its irrigation project or to keep the same in proper operation, and that unless properly operated and cared for during the fall of 1921 and the winter next ensuing so that adequate water supply might be stored in the reservoir, agricultural operations of the settlers could not be carried on, and that it was necessary for the conservation of plaintiff's security and for the agricultural operations of the settlers upon the lands that a receiver be appointed by the court to operate the said irrigation system (Record p. 13). In the order appointing the receiver the court found "that it is necessary to preserve the properties mortgaged, and to that end to operate the irrigation system now owned by the defendant Jordan Valley Land and Water Company", and directed the receiver to maintain said irrigation system and operate the same to the end that the mortgagors referred to in the bill of complaint may have the water to which they are entitled, and to the end that the securities listed

in the bill of complaint may be preserved and protected from destruction in value.

Even if this were a timely and direct appeal from the order appointing the receiver, we submit that the appellate court would not be inclined to sit in review of the finding of the trial court that the appointment of a receiver was necessary to the preservation of the property, especially where, as in this case, there is nothing in the record from which the court could draw a conclusion that the action of the court below was erroneous or an abuse of discretion. But clearly, under the provisions of Section 129 of the Federal Judicial Code, the time within which this court might have reviewed the order appointing the receiver, expired long before this appeal was taken.

The burden of appellant's argument is that the receivership was entirely for the benefit of the appellee and the preservation of its security. Such is not the case. The primary purpose was to protect the settlers in their right to receive water for their lands which are subject to the mortgages held as collateral by the appellee. The preservation and operation of the system enured to the benefit, not only of the settlers whose mortgages are held by appellee, but of all others who have invested their money in lands under said irrigation system. More than this, by preserving the system and keeping it in operation, it enhanced the chances of the system being sold to advantage, and thus enured directly to the benefit of general creditors whose trustees are here complaining because the court has sought to pro-

tect its receiver in his expenses and compensation for efforts expended for the benefit of these same creditors.

No citation of authority is needed to support the proposition that court has power to see that its receiver is compensated for services rendered and expenses incurred in the discharge of his functions. Nor is it required that the receiver be paid out of the assets constituting the security sought to be foreclosed. This honorable court has clearly settled that question.

The case of *Strain v. Palmer, 159 Fed. 628* (Ninth Circuit) is singularly in point. There a receiver was appointed to collect the rents, issues and profits of mortgaged lands under process of foreclosure. The lands sold for enough to pay the debt in full with all the costs of foreclosure. A creditor of the mortgagor objected to the payment of the receiver's charges out of the assets remaining in the hands of the receiver. This honorable court said:

> "The objections of the appellant to the report and account of the receiver were properly overruled. In the report and account the receiver claimed credit for expenses incurred by him in the discharge of his duties as receiver. The objections of the appellant to the allowance of this account were based upon the fact, as shown in the said receiver's report, that at the sale of the said real estate in pursuance of the decree of this court the complainant herein purchased all of the said real estate for a sum sufficient to cover their mortgage

indebtedness, interest and costs, so that the said mortgage thereby became satisfied in full, without recourse to the said hay and oats which, had theretofore, to-wit, on the 17th day of August, 1904, been purchased by the appellant. The court acted within its jurisdiction in appointing the receiver, and, this being so, he had the right to resort to the property in his possession as such receiver for the payment of his expenses in connection with such property and his compensation as receiver. 'When it becomes the duty of a court of equity to take property under its charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of, and saving it, including the allowance to the receiver for his services.' Ferguson v. Dent (C. C.) 46 Fed. 88; Elks Fork Gas Co. v. Foster, 99 Fed. 495, 39 C. C. A. 615."

"This rule is not changed by the fact, shown by the record in this case, that after the receiver was appointed the mortgaged premises were sold, under the decree of foreclosure in the action in which the receiver was appointed for an amount sufficient to pay the indebtedness secured by the mortgage and the costs of the action."

The situation that confronts us in this case is a somewhat peculiar and unusual one. The securities acquired by appellee through its foreclosure in this suit consist, as has already been noted, of notes and mortgages given by settlers under the Jordan Valley Project and as-

signed to the appellee. The lands covered by the mortgages are dependent upon the Jordan Valley Irrigation System for water, without which the lands would be practically valueless. The owner of the irrigation system is bankrupt, and for nearly two years has ceased to function in the operation of the irrigation system or otherwise and the system was kept in operation by the receiver under the order of the Court. Appellants complain because the receiver was the managing agent of the appellee. No valid basis for such complaint exists. The irrigation system could not be kept in operation without money. The appellants could not supply any money. Conditions were such that no stranger would furnish funds, and it was only an interested party like the appellee who would be willing to advance the expenses necessary to keep the system in operation. Appellants have called attention of the Court to the fact that the settlers have organized an irrigation district under the State law, and are seeking to acquire the Jordan Valley Irrigation System as a part of the system to be operated by the district, and appellants charge that a conspiracy exists between the newly formed irrigation district and the appellee and the receiver, to enable the district to acquire the system at a price not in excess of the amount allowed the receiver. No foundation for this charge exists whatever. Let us pause and reflect that if the system should be turned over to the trustee in bankruptcy, as petitioned for, all that the trustee could do would be to sell the same under bankruptcy proceedings. We fail to see upon what possible theory the property could be sold by the trustee for any

larger sum than it could be sold for by the receiver. Either sale would be at public auction to the highest bidder, and subject to the approval of the Court, so that the charge that the receiver would sell the property at a price which would in effect defraud the general creditors of the bankrupt, is a wholly gratuitous assumption. Considering the case from this angle, the suspicion naturally arises that what the appellants are really attempting to do by this appeal is to compel the irrigation district to buy peace by paying to the trustee a larger sum for the assets than they would possibly bring at either a receiver's or trustee's sale in the ordinary course. The Court can readily see the situation that confronts the settlers under the irrigation project. The corporation responsible to the settlers for the operation of the system is bankrupt and wholly unable to function. The irrigation district cannot successfully function until it acquires control of the irrigation system. Without water the lands of the settlers are practically valueless and the settlers left to face bankruptcy themselves and the loss of their land through foreclosure. It cannot be presumed that in this deplorable situation the assets in the hands of the receiver will enhance in value with the progress of time, and it would seem that unless these assets are permitted to be sold and the irrigation system put into the hands of some one competent and qualified to operate it, the inevitable result will be irreparable loss and damage to all concerned. Each tract of land under the project was entitled to a specific quantity of water for irrigation. This water was appurtenant to the land and not merely

a personal right in the land owner. The settlers or any of them, in view of the insolvency of the appellants and the danger of loss confronting the settlers, would certainly have had a right to commence a suit in equity for the appointment of a receiver of the insolvent corporations to operate the irrigation system and thereby conserve the rights of the settlers. The holder of the mortgages involved in the foreclosure had a similar, if not equal, interest in the maintenance of the irrigation system, and it would seem equally true that the appellee as holder of the mortgages, might have commenced a suit independent of any foreclosure proceedings to have a receiver appointed for like purposes. The complaint filed by the appellee in this suit was in effect more than merely a bill to foreclose lien upon collateral security. It was in effect a bill against an insolvent corporation for the appointment of a receiver to conserve assets not included directly in the mortgage security, but of vital concern to the maintenance of the value of the mortgage security. Appellants' brief contains an argument of much length with citation of numerous authorities that it is the duty of the receiver of a Court of equity to give way to a trustee in bankruptcy and surrender the assets of the bankrupt to the trustee. We think an examination of these authorities will show that they were all cases where the adjudication of bankruptcy occurred within four months from the date of the appointment of the receiver, and this circumstance distinguishes those cases from the case at bar and renders them valueless as a guide to the solution of the question confronting us. It appears upon the face of the appel-

lants' record that nearly six months elapsed between the date of appointment of a receiver and the filing of the petition in bankruptcy in the District Court for Idaho. Under these circumstances, we submit that the trustee in bankruptcy is not entitled to dispossess the receiver appointed by the District Court in Oregon. The assets which the appellants seek to have turned over to the trustee in bankruptcy consist largely of an irrigation project in Malheur County, Oregon, and within the jurisdiction of the Court appointing the receiver. One of the bankrupts is a Nevada corporation and the other an Idaho corporation, and the bankruptcy proceedings were instituted in Idaho. The law is thus stated in High on Receivers, 4th Edition. Section 50:

> "Questions of considerable controversy and importance have frequently arisen under our peculiar judicial system touching the relative powers of the State and Federal Courts in the appointment of receivers over the same subject matter in litigation in both tribunals. These questions have usually been determined upon principles of comity and it is now the established doctrine of both State and Federal Courts that that Court, whether State or Federal, which first acquires jurisdiction of the subject matter or of the res, and which is first put in motion, will retain its control to the end of the controversy and the possession of its receiver will not be disturbed by the subsequent appointment of a receiver by the other Court;"

and in the same text, Section 52, it is stated thus:

> "The Federal Courts have generally recognized the doctrine under discussion, and have almost uniformly conceded the jurisdiction to the State tribunals when the latter have first acquired control over the subject matter and the parties, or when the receiver of the State Court has first acquired possession of the assets, even when the conflict of jurisdiction has been presented to the United States Courts in the course of proceedings in bankruptcy there."

In I Collier on Bankruptcy, 12th Edition, page 558, it is stated:

> "The right of a State Court through receivers appointed by it, to administer property of one subsequently adjudged bankrupt, brought within its grasp, under its process, more than four months prior to the filing of its petition in bankruptcy is not terminated by an adjudication in bankruptcy."

Blair vs. Brailey, 221 Fed. 1.

In this case, it appears that more than six months before filing of petition in bankruptcy in the United States District Court for the Northern District of Ohio, receivers were appointed in the District Court for the Southern District of Georgia, who, pursuant to the orders of that Court and more than six months before the institution of the bankruptcy proceedings, took possession of the property of the defendant and thereafter continued to administer it under the orders of the Court.

The trustee in bankruptcy thereafter filed in the Georgia Court a petition that he, as such trustee be recognized as entitled to the possession of all the property and assets of the bankrupt as of the date of the filing of the petition in bankruptcy, and that the receivers appointed by the Georgia Court be decreed to turn over and surrender to him the possession of all said property. The United States Circuit Court of Appeals for the 5th District, reviewing the case, says:

> "The Bankruptcy Act does not render inapplicable to a question raised as to what court is entitled to administer property of a bankrupt the rule that the court which first obtains rightful jurisdiction over a subject-matter is not to be interfered with by any other court, but only modifies that rule by making it inapplicable in certain instances where a court, other than the one in which a bankruptcy proceeding is instituted first assumed jurisdiction within a specified time before the institution of the bankruptcy proceedings. The general rule prevails to prevent any interference even by a court of bankruptcy with another court's control over property which rightfully has been subjected to its jurisdiction, if that jurisdiction attached more than four months before the petition in bankruptcy was filed. Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. It is not 'all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent,' which, under the provisions of section 67 of the Bankruptcy Act, are to be

> deemed null and void, but only such levies, judgments, etc., so obtained 'at any time within four months prior to the filing of a petition in bankruptcy.' Where a valid judicial lien or levy has been secured or made four months or more prior to the bankruptcy, proceedings to enforce the same may be prosecuted to the end. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; In re Koslowski (D. C.) 153 Fed. 823."

One other question remains for our consideration, namely: the effect of the order entered July 14, 1922, by consent of the parties. Appellants claim that this was the result of an agreement entered into between the appellee and the Jordan Valley Irrigation District. Such was not the case. That agreement was only incidental to the entire matter. The appellants had come down to Portland and filed their petitions in the case at bar, asking that the receiver be required to turn over the assets to the trustees respectively, and the appellants also answered the petition of the receiver for allowances for his compensation and expenses, and this matter came on for hearing upon all of the petitions and answers, all the parties being before the Court, as recited in the order of July 14th (Record p. 78), and the matter actually came on for hearing and was heard as shown by the Court's order, and the Court found and so states in the order that an agreement had been reached, not between the receiver and the irrigation district, but "the *parties* (Jordan Valley Irrigation District was not a party) having reached an agreement thereon and the Court being fully advised by *agreement*

of the parties, it is considered, ordered and adjudged, etc." By this order the Court fixed the compensation of the receiver and his counsel, as it undoubtedly had a right to do, and impressed these allowances as specific liens upon the properties in the hands of the receiver, and ordered and directed that the appellee pay these charges and be subrogated to the lien of the receiver therefor, and the appellee, in obedience to the order of the Court, did pay all of the said allowances. The order provided that the assets in the hands of the receiver should be turned over to the trustees in bankruptcy, only after the appellee had been reimbursed for the payment so made by it. The order of July 14th did not fix a time limit within which the appellee should be reimbursed for its advances on that behalf, but it must be presumed that such repayment would be made within a reasonable time. After more than three months had elapsed without anything having been done by the appellants, the appellee applied to the Court for an order of sale of the assets, and such order was entered, from which this appeal is taken. Prior to the entry of said order there was filed the petition of the appellant Wegener for an order vacating the order of July 14, 1922, and with this were filed certain affidavits (Record pp. 82-101), but we call the particular attention of the Court to the fact that no petition or motion was filed in the lower Court by the appellant Hoover for the vacation or modification of the order of July 14th, and we submit that under the authorities, before the appellant Hoover could seek a review by appeal to this Court it was necessary that he move in the lower court for a vacation of

the order of July 14th. It is true that he filed an affidavit in the Court below (Record p. 82), but this is neither a motion nor a petition for a modification or vacation of the order of July 14th.

It appears from the order of the Court that there was no motion or petition on the part of the appellant Hoover presented to the Court, nor considered at said hearing, but only the petition by the appellant Wegener. This court is therefore without jurisdiction to entertain the appeal of the appellant Hoover or to vacate or modify the order of July 14th, in so far as it affects said appellant Hoover and those whom he represents.

Both the appellants voluntarily submitted themselves to the jurisdiction of the Court long before the hearing on July 14, 1922, and on that day represented to the Court that they were there properly and with authority to act in the premises, and led the Court to believe that they had authority to act in the manner in which they did, and the appellate Court must presume that the Court below found that they had authority to make the agreement upon which the order of July 14th was entered. Now they come into Court and attempt to plead their own wrong and say that they acted without sufficient authority in consenting to the entry of the order, but there is nothing before this Court upon which the Court could find that they acted without authority. They either led or misled the Court on July 14th into the belief that they had adequate authority, and the only showing to the contrary consists in the

self-serving affidavits filed on October 30, 1922. We submit that the matter cannot be proven in that manner. If it was necessary for the trustees to have special authority to act as they did, that authority would have to come from an order of the referee in bankruptcy in the District Court for Idaho, and we submit that the records or lack of record of a Court cannot be proven by affidavits such as were filed by these appellants. If no order had been entered in the bankruptcy court, that fact should have been shown by the evidence of a proper officer of that Court, but no competent evidence whatever was submitted to the Court below to show a lack of authority on the part of the trustees.

In the case of Pacific Railroad against Ketchum, 101 U. S. 289, at page 296, the Court says:

> "A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the company assented through its solicitor. This is equivalent to a direct finding by the Court as a fact that the solicitor had authority to do what he did and binds us on an appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor or the officers of the corporation in such a matter is by an appropriate proceeding in the Court where the consent was received and acted on and in which proof may be taken and the facts ascertained. We take a case on appeal as it comes to us in the record and receive no new evidence.

Here the record states in terms that the company assented to all that has been done."

So in this case the record shows that the Court found that the parties had reached an agreement and proceeded to enter its order upon the agreement of the parties. This is equivalent to a finding that the counsel representing the parties had authority to enter the consent which the record shows, and such a finding on the part of the Court is not to be lightly disturbed without competent evidence to show the contrary. It certainly was not incumbent upon the District Court for Oregon in the midst of a hearing when it was represented to the Court that an agreement had been reached to halt the proceedings and wait for certified copies of bankruptcy orders from Idaho, before accepting the representations of counsel for the parties that they were acting properly.

The matter before the Court on July 14th presents an entirely different aspect from a case involving a claim by or against a bankrupt. It was not a case of compounding a claim against a debtor of the bankrupt or a claim of a creditor against the bankrupt. It involved a matter peculiarly within the jurisdiction and discretion of the District Court for Oregon, and that Court had a right to act in the manner in which it did act whether or not these appellants were in Court at the hearing and whether or not the appellants consented to the entry of the order, in view of the inherent power of the Court of equity to make allowances to its receiver and impress a lien upon the assets to secure payment thereof.

If, as a matter of fact, the trustees in bankruptcy transcended their unlawful authority in consenting to the decree and thereby the creditors of the bankrupt suffered injury, then the trustees and their bondsmen might have to respond to the creditors, but that would not affect the right of the Court of equity to see that its receiver was reimbursed. We submit that the appeal is without merit and should be dismissed.

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